UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CVD EQUIPMENT CORPORATION, Plaintiff, -against- TAIWAN GLASS INDUSTRIAL CORPORATION, and MIZUHO CORPORATE BANK, LTD., Defendants.	:	Civil Action No.: 10 CV 0573 (RJH) (RLE)
TAIWAN GLASS INDUSTRIAL CORPORATION, Counterclaim Plaintiff, -against- CAPITAL ONE, N.A., Counterclaim Defendant.	:	

MEMORANDUM OF LAW OF CAPITAL ONE, N.A.
IN SUPPORT OF MOTION TO DISMISS COUNTERCLAIM

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TABLE OF CONTENTS

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 2

The Standby LOC and Conditions for Cancellation 2

CVD Satisfies the Cancellation Conditions 4

Taiwan Demands Payment After the Standby LOC is Cancelled 5

Taiwan's Allegations in the Counterclaim 5

ARGUMENT 6

THE COUNTERCLAIM FAILS TO STATE A CLAIM AGAINST CAPITAL ONE BECAUSE THE STANDBY LOC WAS CANCELLED BEFORE TAIWAN MADE ITS DEMAND FOR PAYMENT 6

A. Standard on this Motion to Dismiss 6

B. The Standby LOC Was Cancelled By Express Terms Before Taiwan Made a Demand for Payment. 7

C. Article 20 of the UCP Does Not Apply to the Cancellation Conditions of the Standby LOC and Does Not Trump the Parties' Express, Agreed-Upon Requirements for Cancellation of the Standby LOC. 9

D. CVD Submitted an "On Board" Bill of Lading Before Taiwan Made a Demand for Payment 12

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

3COM Corp. v. Banco de Brasil, S.A.,
2 F. Supp. 2d 452 (S.D.N.Y. 1998)....................9

Cohen v. Local 338-RWDSU/UFCW,
No. 08 Civ. 01151(RJH)(FM), 2010 WL 3199695 (S.D.N.Y. Aug. 12, 2010) (Holwell, J.) 7, 8

Continental Ins. Co. v. Atl. Cas. Ins. Co.,
603 F.3d 169 (2d Cir. 2010)....................11

Cooperative Agricole Groupement De Producteurs Bovins De L'ouest v. Banesto Banking Corp.,
No. 86 Civ. 8921(PKL), 1989 WL 82454 (S.D.N.Y. July 19, 1989) 9, 13

First Commercial Bank v. Gotham Originals, Inc., ...14
64 N.Y.2d 287, 295 (1985)

Hollander v. Copacabana Nightclub,
624 F.3d 30 (2d Cir. 2010)....................6

Marino Industries Corp. v. Chase Manhattan Bank, N.A.,
686 F.2d 112 (2d Cir. 1982)....................9

MRM Sec. Sys., Inc. v. Citibank, N.A.,
No. 96 Civ. 3721 (KMW), 1997 WL 198074 (S.D.N.Y. Apr. 23, 1997)....................13

Mut. Exp. Corp. v. Westpac Banking Corp.,
983 F.2d 420 (2d Cir. 1993)....................7, 11, 12

Old Rep. Surety Co. v. Quad City Bank & Trust Co.,
681 F.Supp.2d 970 (C.D. Ill. 2009) 7

Semetex Corp. v. UBAF Arab Am. Bank,
853 F. Supp. 759 (S.D.N.Y. 1994)....................12

Todi Exps. v. Amrav Sportswear Inc.,
No. 95 Civ. 6701(BSJ), 1997 WL 61063 (S.D.N.Y. Feb. 13, 1997)....................8, 9

Tuthill v. Union Sav. Bank,
561 N.Y.S.2d 286 (2d Dep't 1990) 13

Williams v. Citibank, N.A.,
565 F.Supp.2d 523 (S.D.N.Y. 2008)....................7, 8

Yak v. Bank Brussels Lambert, BBL (USA) Holdings Inc.,
252 F.3d 127 (2d Cir. 2001)....................8

RULES

Fed. R. Civ. P. 12(b)(6)....................6, 7

Counterclaim defendant Capital One, N.A. ("Capital One") submits this memorandum of law in support of its motion to dismiss the claim asserted against it by Taiwan Glass Industrial Corporation ("Taiwan") in Taiwan's Amended Answer and Counterclaim filed on August 31, 2010 (the "Counterclaim"; a copy of the Counterclaim is annexed as Ex. 1 to the Declaration of Paul B. Maslo dated January 28, 2011 ("Maslo Decl.")).

PRELIMINARY STATEMENT

Taiwan's sole claim against Capital One is for wrongful dishonor of a standby letter of credit (the "Standby LOC") issued by Capital One on October 8, 2008 in connection with an underlying agreement between Taiwan and CVD Equipment Corporation ("CVD"). As is clear from the facts alleged in the Counterclaim and the documents it relies on, Capital One properly refused payment because the Standby LOC had been cancelled before Taiwan made its demand for payment -- in fact, before Taiwan was even permitted to make a demand under the Standby LOC. Taiwan attempts to circumvent the unambiguous terms of the Standby LOC by imposing additional terms from an inapplicable provision of the ICC Uniform Customs and Practice for Documentary Credits ("UCP"; a copy of the cited portions of the UCP is annexed as Maslo Decl. Ex. 9). Specifically, Taiwan alleges that Capital One's cancellation was not valid because the bill of lading CVD submitted was required to bear an "on board" indication. Taiwan's claim fails as a matter of law for two reasons.

First, there is no such requirement in the Standby LOC. The plain language of the document itself, which is annexed to the Counterclaim, defeats Taiwan's effort to read this requirement into the letter of credit. Although the Standby LOC sets forth a number of express requirements for the bill of lading required for cancellation, it does not require that it bear an "on board" indication. While Taiwan attempts to impose this requirement by citing Article 20 of the

UCP, the UCP itself makes clear that the requirement does not apply to documents submitted in support of a request for cancellation. Taiwan's effort to read additional terms into the Standby LOC should be rejected.

Second, even if Taiwan were correct that UCP Article 20 applied to the cancellation request (which it did not), the Counterclaim would still fail to state a claim against Capital One because, as every party in this case has acknowledged, CVD did submit a revised bill of lading that contained an "on board" indication before Taiwan was even permitted to demand payment under the Standby LOC. Indeed, Taiwan's Counterclaim alleges that CVD submitted a bill of lading "purporting to have shipped the Equipment to Taiwan Glass." Counterclaim. ¶ 65. In other words, it is undisputed that before Taiwan made its demand, CVD submitted a bill of lading that did exactly what Taiwan claims it was required to do. Even if, as Taiwan now claims, that bill of lading was inaccurate, the law is clear that Capital One was entitled to rely on the face of the document.

Taiwan's claim should be recognized for what it is: An ill-conceived, last-minute attempt to drag Capital One into the underlying contract dispute between Taiwan and CVD. Regardless of the merits of the underlying dispute, Capital One properly refused to honor Taiwan's post-cancellation demand on the Standby LOC. Taiwan's Counterclaim should be dismissed as to Capital One with prejudice.

STATEMENT OF FACTS

The Standby LOC and Conditions for Cancellation

Taiwan's claim against Capital One is based on the Standby LOC, which was issued by Capital One in connection with an underlying agreement between CVD and Taiwan dated August 29, 2008 (the "Underlying Agreement"). Counterclaim Ex. A. In the Underlying

Agreement, Taiwan agreed to purchase certain equipment (the "Equipment") to be designed and manufactured by CVD. Counterclaim ¶¶ 17-18. Regarding the Standby LOC, the Underlying Agreement provides for a "30% payment against Seller issuing a Standby letter of Credit, [which] expires with shipment." Counterclaim Ex. A at 3.

Capital One issued the Standby LOC on October 9, 2008 addressed to Mizuho, Taiwan's bank. Counterclaim ¶ 24 and Ex. C. Section 6A sets out the "Documents Required" for payment under the Standby LOC. Counterclaim Ex. C § 6A. These documents were to be submitted by Mizuho, acting as the advising bank for Taiwan as beneficiary. The earliest that Taiwan was permitted to make a presentation for payment under the Standby LOC was after January 1, 2010. Counterclaim Ex. C § 7A.

The Standby LOC also included a separate section of "Additional Conditions." Counterclaim Ex. C §7A. In this section, the Standby LOC included a cancellation clause which provided, in part:

> This letter of credit will be canceled upon the earliest of: . . . (ii) copy of an original bill of lading submitted by CVD Equipment Corporation issued to the order of Taiwan Glass Ind. Corp. 261 Sec 3, Nanking E. Rd. Taipei 10566, Taiwan dated not later than November 30, 2009 and indicating CVD Equipment Corporation as Shipper.

Counterclaim Ex. C § 7A (emphasis added).[1] Unlike the commercial letter of credit issued by Mizuho on behalf of Taiwan (the "Taiwan LOC"; Counterclaim Ex. B), the cancellation provision of the Standby LOC did not require a "clean on board ocean bill of lading." *Cf.*

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[1] Other events that would trigger automatic cancellation under the provision were: (i) the passage of 15 days from its date, if $3,584,000 were not wired to CVD, (iii) Capital One's honoring drawing requests aggregating the stated amount, (iv) the day on which CVD received an authenticated message from Taiwan through Mizuho stating that CVD's obligations under the contract were satisfied, and (v) the expiration date, January 21, 2010. Counterclaim Ex. C § 7A. The Standby LOC further provided that "The day on which [Mizuho] deliver[s] this letter of credit to us for cancellation, this letter of credit shall terminate and we shall no longer have any obligation hereunder." *Id.*

Counterclaim Ex. B § 46A with Counterclaim Ex. C § 7A. It did not require the bill of lading to state that the Equipment had been loaded on a vessel and did not require a particular date of shipment.

CVD Satisfies the Cancellation Conditions

On December 2, 2010, CVD sent Capital One a letter requesting cancellation of the Standby LOC. Maslo Decl. Ex. 2. It enclosed a bill of lading that met all the requirements of the cancellation provision: It was an original bill of lading, submitted by CVD, issued to Taiwan at the required address, dated November 27, 2009, and indicating CVD as Shipper. Counterclaim ¶ 55; Maslo Decl. Ex. 3. The bill of lading purported to have shipped the Equipment to Taiwan. Counterclaim ¶ 65. Upon this submission, the Standby LOC was cancelled by its own express terms. Counterclaim Ex. C § 7A.

On or about December 8, 2010, Capital One notified Mizuho (Taiwan's bank) that the Standby LOC had been cancelled based on the bill of lading CVD submitted to Capital One. Counterclaim ¶ 55. Mizuho indicated that it disagreed with the cancellation because, it claimed, the bill of lading submitted by CVD was required to have an "on board" indication. Counterclaim ¶ 57. (A copy of the correspondence referenced in the Counterclaim is annexed as Maslo Decl. Ex. 4). Capital One explained that no such indication was required for this purpose. Maslo Decl. Ex. 5. Nevertheless, on December 24, 2010, CVD submitted another original bill of lading stamped "CLEAN ON BOARD" to Capital One, and Capital One forwarded it to Mizuho at CVD's request. *See* Taiwan's Memorandum of Law in Opposition to CVD's Cross Motion for Summary Judgment dated September 30, 2010 ("Taiwan SJ Opp. Memo") at 7, n.11; Maslo Decl. Ex. 6 at 2; Mizuho Memorandum of Law in Support of its Motion for Summary Judgment

("Mizuho SJ Memo") dated July 28, 2010 at 6; Huang Decl. dated July 26, 2010, ex. I; Mizuho Statement of Undisputed Facts ¶¶ 22-24; Maslo Decl. Ex. 7.

Taiwan Demands Payment After the Standby LOC is Cancelled

On January 4, 2010, Taiwan made a demand for payment under the cancelled Standby LOC. Counterclaim ¶ 58. Taiwan alleges that Capital One responded on or about January 7, stating that (as Taiwan was aware) the Standby LOC had been cancelled on or about December 9, 2009. Counterclaim ¶ 59. Capital One also advised Taiwan that the submission did not conform to the language of the Standby LOC. Counterclaim ¶ 59. Taiwan made another demand for payment under the cancelled Standby LOC on January 11, 2010, correcting the non-conforming language. Counterclaim ¶ 60. Capital One again responded that the Standby LOC had been cancelled upon CVD's submission of a complying bill of lading. Counterclaim ¶¶ 61-62.

Taiwan's Allegations in the Counterclaim

Taiwan filed its original answer and counterclaim on April 15, 2010 and did not name Capital One as a party. Taiwan added Capital One for the first time in its Counterclaim filed on August 31, 2010. The central allegation of Taiwan's Counterclaim is that CVD failed "to design, manufacture and install the Equipment in accordance with the terms of the agreement." Counterclaim ¶ 69. Taiwan alleges that CVD shipped an incomplete and non-conforming system "so that it could have a pretext for canceling the [Standby LOC]." Counterclaim ¶ 63.

Taiwan's sole claim against Capital One is that the cancellation of the Standby LOC was improper because the bill of lading submitted by CVD failed to contain an indication that the goods had been shipped "on board" a named vessel.[2] Counterclaim ¶ 57. As a result, Taiwan alleges, Capital One's refusal to honor the Standby LOC, based on the fact that it had been cancelled prior to Taiwan's demand, was improper. Counterclaim ¶ 95. Taiwan's contention that the bill of lading did not indicate that the goods had been shipped is contradicted by its own allegations. Taiwan admits that CVD "submit[ed] a bill of lading purporting to have shipped the Equipment to Taiwan," intending to "induce Capital One Bank to cancel" the Standby LOC. Counterclaim ¶ 65 (emphasis added). *See also* Counterclaim ¶¶ 81-82 ("CVD knowingly made false representations that it had shipped the Equipment to Taiwan," which "induce[d] Capital One Bank to cancel the CVD L/C.").

ARGUMENT

THE COUNTERCLAIM FAILS TO STATE A CLAIM AGAINST CAPITAL ONE BECAUSE THE STANDBY LOC WAS CANCELLED BEFORE TAIWAN MADE ITS DEMAND FOR PAYMENT

A. Standard on this Motion to Dismiss

To survive a motion to dismiss under Rule 12(b)(6), the complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Hollander v. Copacabana Nightclub*, 624 F.3d 30, 32 (2d Cir. 2010) (citing *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)). This standard demands "more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 33 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). Thus, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal quotations omitted).

[2] There is no dispute that the vessel, the "Zim Moskva," is named in the "Export Carrier" box on the bill of lading. Maslo Decl. Ex. 3. Taiwan's only alleged defect is that the bill of lading does not bear an indication that the equipment was "on board."

"In resolving a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief may be granted, 'a court may consider documents attached to the complaint as an exhibit or incorporated in it by reference, . . . matters of which judicial notice may be taken, or . . . documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit.'" *Cohen v. Local 338-RWDSU/UFCW*, No. 08 Civ. 01151(RJH)(FM), 2010 WL 3199695, at *4 (S.D.N.Y. Aug. 12, 2010) (Holwell, J.) (quoting *Chambers v. Time-Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)) (other internal quotations omitted, alterations in original). "The court need not accept as true an allegation that is contradicted by documents on which the complaint relies." *Williams v. Citibank, N.A.*, 565 F.Supp.2d 523, 527 (S.D.N.Y. 2008) (internal quotations and citations omitted).

Taiwan admits that the following arguments, as summarized in Capital One's January 3, 2011 letter to the Court, are "purely questions of law resting on undisputed facts." Maslo Decl. Ex. 6 at 2.

B. The Standby LOC Was Cancelled By Its Express Terms Before Taiwan Made a Demand for Payment.

The Counterclaim fails to state a claim against Capital One for wrongful dishonor because the Standby LOC was terminated by its express terms before Taiwan made its demand for payment.[3]

[3] The Court need not look beyond the express provisions of the Standby LOC and the bill of lading described in the Counterclaim to dismiss the Wrongful Dishonor claim against Capital One as a matter of law. "In construing the nature and terms of a letter of credit, the same general principles apply which govern other written contracts. Where the terms of a contract are clear and unambiguous, the terms alone will determine the duties of the parties." *Old Rep. Surety Co. v. Quad City Bank & Trust Co.*, 681 F.Supp.2d 970, 974 (C.D. Ill. 2009). *Accord Mut. Exp. Corp. v. Westpac Banking Corp.*, 983 F.2d 420, 423 (2d Cir. 1993) ("[L]etters of credit must be interpreted on their face, independent of other contracts and the underlying transaction.").

The Standby LOC provides that it "will be cancelled" upon the occurrence of the earliest of five events, one of which is CVD's submission of a bill of lading to Capital One.[4] Counterclaim Ex. C § 7A (emphasis added). The Standby LOC sets forth exactly what the bill of lading was required to include to trigger cancellation: (1) a copy of an original bill of lading; (2) submitted by CVD; (3) issued to the order of Taiwan; (4) dated not later than November 30, 2009; and (5) indicating CVD as Shipper. Counterclaim ¶ 54 and Ex. C § 7A. The Standby LOC imposed no other requirements for cancellation pursuant to item (ii). Counterclaim Ex. C § 7A.

The bill of lading submitted by CVD to Capital One on December 2, 2009 strictly complied with each of the terms in the cancellation clause.[5] It was an original bill of lading, submitted by CVD, issued to Taiwan at the required address, dated November 27, 2009, and indicating CVD as Shipper. Counterclaim ¶ 55; Maslo Decl. Ex. 3.[6] The bill of lading purported to have shipped the Equipment to Taiwan. Counterclaim ¶¶ 65, 82.

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[4] Although Taiwan alleges that the Standby LOC provides that it "may be cancelled" upon the earliest of the events set forth (Counterclaim ¶ 54), the Standby LOC actually provides that it "will be cancelled" upon the earliest of those events to occur. Counterclaim Ex. C § 7A. The Court "need not accept as true an allegation that is contradicted by documents" attached to the Counterclaim. *Williams v. Citibank, N.A.*, 565 F. Supp. 2d 523, 527 (S.D.N.Y. 2008) (internal quotations and citations omitted).

[5] Strict compliance with a letter of credit's terms – including its cancellation provisions – "prevents imposition of an obligation upon the bank that it did not undertake and avoids jeopardizing the bank's right to indemnity from its customer." *Todi Exps.*, 1997 WL 61063, at *4.

[6] The Court may consider the bill of lading on this motion to dismiss, even though Taiwan does not attach it to its Counterclaim. There is no dispute that Taiwan had it in its possession, refers to it in the Counterclaim and clearly relied on it for its allegations. Taiwan alleges that CVD "submit[ed] a bill of lading purporting to have shipped the Equipment to Taiwan." Counterclaim ¶ 65 (emphasis added). *See Yak v. Bank Brussels Lambert, BBL (USA) Holdings Inc.*, 252 F.3d 127, 130-131 (2d Cir. 2001) (district court properly considered agreements not attached to complaint on motion to dismiss where plaintiff had "actual notice" of them); *Cohen*

When CVD submitted the bill of lading, the Standby LOC was cancelled by its own express terms, and Capital One had no further obligation to pay. *3COM Corp. v. Banco de Brasil, S.A.*, 2 F. Supp. 2d 452, 456 (S.D.N.Y. 1998) ("after the letter of credit has expired, the issuing bank no longer has the obligation to pay"); *Todi Exps. v. Amrav Sportswear Inc.*, No. 95 Civ. 6701(BSJ), 1997 WL 61063, at *4 (S.D.N.Y. Feb. 13, 1997) (after the date of termination "the bank has no obligation to pay"). Whether or not CVD breached its obligations under the underlying agreement, as the Counterclaim alleges, is irrelevant to Taiwan's claims against Capital One. *Cooperative Agricole Groupement De Producteurs Bovins De L'ouest v. Banesto Banking Corp.*, No. 86 Civ. 8921(PKL), 1989 WL 82454, at *21 (S.D.N.Y. July 19, 1989) ("When Banesto [the issuer] did not receive the proper documents prior to the expiry date, whether due to its customer's wrongful act or otherwise, its obligation to pay terminated."). [7]

Accordingly, the Standby LOC was cancelled before Taiwan's demand, and as a matter of law Capital One had no obligation to pay. Taiwan's claim against Capital One should be dismissed.

C. Article 20 of the UCP Does Not Apply to the Cancellation Conditions of the Standby LOC and Does Not Trump the Parties' Express, Agreed-Upon Requirements for Cancellation of the Standby LOC.

Taiwan attempts to avoid the express and unambiguous terms of the Standby LOC by alleging that the bill of lading submitted by CVD for purposes of cancellation was required to contain the elements set forth in UCP Article 20. But while the Standby LOC adopts the UCP to

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v. Local 338-RWDSU/UFCW, No. 08 Civ. 01151(RJH)(FM), 2010 WL 3199695, at *4 (S.D.N.Y. Aug. 12, 2010).

[7] *Accord Marino Industries Corp. v. Chase Manhattan Bank, N.A.*, 686 F.2d 112, 115 (2d Cir. 1982) ("It is the complete separation between the underlying commercial transaction and the letter of credit that gives the letter its utility in financing transactions. . . . The bank's sole function is the financing; it is not concerned with or involved in the commercial transaction.").

the extent applicable, Article 20 has no application to the cancellation clause. To the contrary, the text of the UCP itself makes clear that the requirements of Article 20 (as well as the other transport document provisions in Articles 19 through 25) apply exclusively to documents presented by a beneficiary or its agent as part of a presentation seeking payment. They are wholly inapplicable to documents provided by an applicant to satisfy a cancellation provision.

Article 20 applies only where a letter of credit "requires presentation of a bill of lading covering transport by sea from one port to another port." Commentary on UCP 600 (Article 20) at 77 (emphasis added) (a copy of the cited portions of the Commentary is annexed as Maslo Decl. Ex. 8). But the only party that can be a "Presenter" is the beneficiary or someone acting on its behalf:

> The term "Presenter" has been introduced into UCP 600 to better define the party that actually makes a presentation of documents to the bank and to reference the party that presents the documents. The presenter may be either the beneficiary of the documentary credit, another bank or another party acting on behalf of the beneficiary.

Commentary on UCP 600 (Article 2) at 19. Because CVD was the applicant of the LOC, not the beneficiary, it could not be a "Presenter," and its submission of the bill of lading for purposes of cancelling the Standby LOC was not a "presentation" subject to Article 20.

Taiwan's attempt to treat CVD's cancellation request as a "presentation" would render any number of UCP provisions nonsensical. For example, Articles 15 and 16 set out, among other things, requirements for "complying presentations." Article 15 provides that when a bank is presented with a "complying presentation" under Article 20 (or one of the other transport document articles, Articles 19-25), it has no option but to "honor" the credit, *i.e.*, pay. UCP 600 Article 15(a). That provision would make no sense if CVD's cancellation request were a presentation, because under no circumstances would it have resulted in payment. Even more absurd would be the result under UCP Article 16(b), which provides that "[w]hen an issuing bank determines that a presentation does not comply, it may in its sole judgment approach the applicant for a waiver of the discrepancies." UCP 600 Article 16(b) (emphasis added). In other words, if Article 20 applied, CVD itself would have had the right to waive any discrepancies in its own cancellation request.

The UCP is silent on what documents may be provided in order to trigger a cancellation provision; it merely provides that a credit cannot be cancelled "without the agreement of the issuing bank, the confirming bank, if any, and the beneficiary." Article 10 (a). In other words, it was left to the parties to determine the conditions required for cancellation, including the form of any required documents. As discussed at p. 8 above, that is exactly what they did. The parties set out specific requirements that were indisputably satisfied by CVD's cancellation request. Counterclaim Ex. C § 7A. The Court need make no further inquiry. "[I]f an agreement is complete, clear and unambiguous on its face, it must be enforced according to the plain meaning of its terms." *Continental Ins. Co. v. Atl. Cas. Ins. Co.*, 603 F.3d 169, 180 (2d Cir. 2010).

If Taiwan wanted to require an "ocean" or "on board" bill of lading to cancel, as contemplated by Article 20 for a presentation, it was up to Taiwan to insist that the language reflect this. Unlike the Taiwan LOC, the Standby LOC makes no mention of an "ocean" bill of lading and does not require an "on board" indication. *Cf.* Counterclaim Ex. B § 46A ("CLEAN ON BOARD OCEAN BILLS OF LADING") *with* Counterclaim Ex. C § 7A ("COPY OF AN ORIGINAL BILL OF LADING").[8] *See Mut. Exp. Corp. v. Westpac Banking Corp.*, 983 F.2d

[8] As Mizuho has made abundantly clear in its papers, bills of lading often do not require an "on board" notation. *See* Mizuho's Memorandum of Law in Opposition to CVD's Cross-Motion for Summary Judgment and Reply Memorandum of Law in Further Support of its Motion for Summary Judgment at 8 ("An ocean bill of lading indicates that the cargo has been loaded on board a vessel, while a received bill of lading indicates that the cargo has been received for

420, 423 (2d Cir. 1993) ("The beneficiary must inspect the letter of credit and is responsible for any negligent failure to discover that the credit does not achieve the desired commercial ends."); *Semetex Corp. v. UBAF Arab Am. Bank*, 853 F. Supp. 759, 777 (S.D.N.Y. 1994) ("Had [the purchaser] wished to assure that no draw could be made on the Letter of Credit until control of the ion implanter passed to a carrier of its choice or until air passage was under way, it could have required an 'on board' bill of lading in the terms of the Letter of Credit."). As the Second Circuit held, "The rule requiring the beneficiary to inspect the letter of credit serves an important purpose. The beneficiary is in the best position to determine whether a letter of credit meets the needs of the underlying commercial transaction and to request any necessary changes." *Westpac Banking Corp.*, 983 F.2d at 423 (internal quotations and citations omitted).

Accordingly, Article 20 does not apply to the cancellation clause of the Standby LOC.

D. CVD Submitted an "On Board" Bill of Lading Before Taiwan Made a Demand for Payment.

Even if the Court were to credit Taiwan's argument that Article 20 applies – which it does not – the cancellation clause of the Standby LOC was still indisputably satisfied before Taiwan made its presentation for payment. Taiwan's sole contention is that the cancellation was not effective unless the bill of lading CVD submitted bore an "on board" stamp. As all parties in this case have acknowledged, however, CVD provided Capital One with a revised bill of lading that Capital One forwarded to Mizuho on December 24, 2009. *See* Taiwan SJ Opp. Memo at 7, n.11; Mizuho SJ Memo at 6; Huang Decl. dated July 26, 2010, ex. I; Mizuho Statement of Undisputed Facts ¶¶ 22-24; Maslo Decl. Ex. 7. The revised bill of lading was stamped "CLEAN

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shipment." *Accord* 22 Richard A. Lord, *Williston on Contracts* § 58:21 (4th ed. 2010) ("Originally, the bill of lading was only a receipt for goods actually placed 'on board' the vessel. While the 'on board' bill is still important, most bills today state that goods are 'received for shipment,' which acknowledges receipt of the goods for shipment.") (internal citations omitted).

ON BOARD." Maslo Decl. Ex. 7. This means that even if the Standby LOC was not properly cancelled on CVD's first request, it would have been cancelled upon CVD's submission of the revised bill of lading on December 24. This was over a week before January 2, the earliest date Taiwan would have even been permitted to make a presentation for payment under the Standby LOC, and nearly two weeks before Taiwan actually made its demand on January 4. No creative interpretation of the Standby LOC or the UCP can overcome this simple, dispositive fact. *See MRM Sec. Sys., Inc. v. Citibank, N.A.*, No. 96 Civ. 3721 (KMW), 1997 WL 198074, at *2 (S.D.N.Y. Apr. 23, 1997) (dismissing wrongful dishonor claim where letter of credit had terminated before presentation); *Tuthill v. Union Sav. Bank*, 561 N.Y.S.2d 286, 287 (2d Dep't 1990) (granting summary judgment dismissing claim for wrongful dishonor where plaintiff made an "untimely presentation").

This result is supported by Taiwan's own allegations. Taiwan admits that CVD "submit[ed] a bill of lading purporting to have shipped the Equipment to Taiwan," intending to "induce Capital One Bank to cancel" the Standby LOC. Counterclaim ¶ 65 (emphasis added). *See also* Counterclaim ¶¶ 81-82 ("CVD knowingly made false representations that it had shipped the Equipment to Taiwan," which "induce[d] Capital One Bank to cancel the CVD L/C."). Taiwan's admission that CVD's bill of lading indicated that the goods had been shipped defeats its claim.

Furthermore, Capital One was entitled to rely on the bill of lading notwithstanding Taiwan's unsubstantiated allegations of fraud. *See Cooperative Agricole Groupement De Producteurs Bovins De L'ouest v. Banesto Banking Corp.*, No. 86 Civ. 8921(PKL), 1989 WL 82454, at *21 (S.D.N.Y. July 19, 1989) ("[T]he issuing bank's duties are solely ministerial. . . . [T]he bank has no duty to investigate an alleged underlying fraud.") (internal citations omitted);

First Commercial Bank v. Gotham Originals, Inc., 64 N.Y.2d 287, 295 (1985) ("[W]hen a required document . . . is forged or fraudulent or there is fraud in the transaction, an issuer acting in good faith . . . is not required to[] refuse to honor a draft under a letter of credit when the documents presented appear on their face to comply with the terms of the letter of credit.").[9]

Accordingly, the Standby LOC was properly cancelled before Taiwan made its demand, and Capital One had no obligation to pay. Taiwan's claim for wrongful dishonor should be dismissed with prejudice.

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[9] Capital One would have the same right to rely on the face of the documents if, as Taiwan claims, CVD's submission of the bill of lading were a "presentation" for purposes of the UCC or the UCP. U.C.C. § 5-109(a)(2) ("If a presentation is made that appears on its face strictly to comply with the terms and conditions of the letter of credit, but a required document is forged or materially fraudulent, or honor of the presentation would facilitate a material fraud . . . [t]he issuer, acting in good faith, may honor or dishonor the presentation."); UCP 600 Article 34 ("A bank assumes no liability or responsibility for the form, sufficiency, accuracy, genuineness, falsification or legal effect of any document, or for the general or particular conditions stipulated in a document or superimposed thereon.").

CONCLUSION

For the foregoing reasons, Capital One's motion to dismiss should be granted in all respects, and Taiwan's Counterclaim should be dismissed as to Capital One with prejudice.

Dated: January 28, 2011

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